Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

KATHRYN C. JORDAN,
Petitioner,

-v.-

PLAYTEX FAMILY PRODUCTS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HERBERT MONTE LEVY
Counsel of Record
Attorney for Petitioner,
Kathryn C. Jordan
60 East 42nd Street
New York, NY 10165
(212) 370-4950

PRINTINGHOUSE PRESS 25 WEST 43RD ST NEW YORK, NY 10036 (212) 719-0990

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QUESTIONS PRESENTED FOR REVIEW

1. May a Court of Appeals affirm the grant of a Defendant corporation's motion for summary judgment, and the denial of Plaintiff's motion for leave to amend her complaint to assert a claim for sexual harassment under Title VII of the Civil Rights Act of 1964, without considering whether the facts alleged constitute sexual harassment, where they have been alleged as state torts — or must the Court grant the relief to which the Plaintiff is entitled under the facts pleaded in the complaint, whether or not leave to amend the complaint be granted, where the complaint alleges and the evidence adduced at discovery shows that

a) shortly after the female Petitioner executive employee (Plaintiff below) rejected and reported to management the repeated unwelcome sexual advances of the corporate Defendant's General Manager (Plaintiff's immediate supervisor), he prepared an adverse, unscheduled personnel review on her, providing for a 60-day probationary period,

b) the Defendant never investigated Plaintiff's claim, but instead aided the alleged harasser in preparing the said review,

c) within two days after the review, the Defendant's President, in response to Plaintiff's request for a meeting with him to discuss the review, insisted upon the General Manager's presence at the meeting, and at such meeting, upon being confronted with Plaintiff's allegations, he exploded in rage, shook his fists threateningly at Plaintiff, and stated that he would not work with her,

d) the next day, notwithstanding the 60-day probationary period, Defendant (through its President and its CEO) terminated Plaintiff's employment,

claiming that this was for her benefit and that of Defendant?

2. The Second Circuit having left undisturbed the District Court's correct finding that there was an issue of fact as to whether Defendant had obtained Plaintiff's release (including release of her stock rights) by coercion — Defendant having allegedly threatened, by its President and another, to blackball her in the industry as a troublemaker unless she gave the release —, was it error to affirm the award of summary judgment to Defendant?

3. Was it error for the Second Circuit to reject, in this sexual harassment case, albeit in dictum, Plaintiff's claim that she had been defrauded into releasing her stock rights by Defendant falsely representing to her that her stock was worthless, the Second Circuit relying, in part, on the theory that she had never purchased the stock, though Defendant's own Inter Office Memo confirmed that Plaintiff "has today purchased 100,000 shares of" Defendant, and though Defendant had pledged to redeposit her check to remedy a bank error?

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POINT I

The affirmance of a grant of summary judgment to a Defendant, without any court having considered whether the factual allegations of the complaint and the supporting evidence adduced during discovery presented a prima facie case of sexual harassment under Title VII, was in conflict with decisions of other courts of appeals (and of this Court) on the important question of whether relief should be denied to a party under a legal theory not enunciated in the complaint, though the ultimate facts to support such theory—unwelcome and rejected sexual advances, never investigated, and immediate retaliatory discharge despite a probation period—had been alleged in the complaint and were substantiated in discovery. 10

POINT II

In view of the alleged coercion and fraud used by Playtex in obtaining Plaintiff's release,—viz., the explicit threat of blackballing and defamation and false representation that her stock was worthless—, Plaintiff's Title VII claim was still viable. Playtex's failure to investigate her claim of its General Manager's unwelcome and rejected sexual advances, and its immediate retaliatory discharge of Plaintiff before the end of her probation period, provided a *prima facie* case of Title VII violation, entitling her to go to trial on any material disputed issues of fact, notwithstanding her prior non-assertion of Title VII claims before the EEOC. 13

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RULE

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In The

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KATHRYN C. JORDAN,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 12, 1997, rehearing denied, September 15, 1997.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

OPINIONS BELOW

The order and opinion of the Second Circuit below is annexed hereto as Appendix A. The District Court's order and opinion denying leave to amend the complaint is annexed as Appendix B1, and its order and judgement granting summary judgment to Defendant is annexed as Appendix B2. The Magistrate Judge's order recommending denial of leave to amend the complaint is annexed as Appendix C1, and his order and opinion recommending the grant of summary judgment is annexed as Appendix C2. The Second Circuit's order denying rehearing is annexed hereto as Appendix D.

None of the above are officially reported. The Second Circuit opinion (Appendix A hereto) is unofficially reported at 1997 U.S. App. LEXIS 13821.

JURISDICTION

The final judgment and order sought to be reviewed was entered on June 12, 1997. An order denying rehearing was made and entered on September 15, 1997. On October 16, 1997, Justice Ginsburg of this Court extended the time for filing the petition for writ of certiorari to and including February 12, 1998. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment and order in question is 28 U.S.C. Sec. 1254 (1).

STATUTE AND RULE INVOLVED

Title VII, Civil Rights Act of 1964, 42 U.S. Code Section 2000e-2:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 54 (c), Federal Rules of Civil Procedure.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

STATEMENT OF THE CASE

Plaintiff Kathryn Jordan ("Jordan") commenced employment with Defendant Playtex Family Products Corp. ("Playtex") on April 3, 1989 as Vice President, Business Manager. Jordan had received excellent references for both her marketing and management skills from prior employers, as verified by Playtex Human Resources. As part of Playtex's efforts to induce Jordan to accept the position at a substantially reduced salary, Playtex promised Jordan the right to purchase 100,000 shares of Playtex at $0.50/share. No deadline was established for the purchase of the stock.

Mark Lowenthal ("Lowenthal") was Jordan's immediate supervisor, and General Manager of Playtex. During the employment interview with her, Lowenthal inquired about Jordan's marital status and made a point of telling her that he was single. He further told Jordan that the stock he was offering her had a sale value of $2 million.

Lowenthal began to make unwelcome sexual overtures toward Jordan shortly after her hire. On numerous occasions he would offer Jordan rides to and from work. Jordan testified that she at first interpreted these offers as "collegial gestures." Lowenthal, revealing to Jordan that he was having problems with his live-in female companion, used these rides to impose on Jordan the intimate details of his personal relationship. Jordan testified that these personal revelations made her uncomfortable. She also testified that the only time Lowenthal treated her in an equitable manner was when he thought he was flirting with her.

Lowenthal then began to pursue Jordan about having dinner with him in New York, ostensibly to celebrate an upcoming acquisition. Jordan initially agreed because she thought Lowenthal was referring to a group dinner with the licensors. However, Lowenthal proceeded to tell her that he

was breaking up with his girlfriend who would be moving out of their apartment, and that he would then be available. He then asked Jordan if she were available. Jordan's response was negative. Jordan testified that Lowenthal positioned the dinner as a date.

Jordan testified that Lowenthal's conduct toward her in the office was very erratic. He would abruptly switch from sexual overtures to sudden outbursts of uncontrollable rage, physical intimidation and extreme verbal abuse—raising his fists to Jordan's face, threats of physical violence. Jordan testified that she was in constant fear of being assaulted by Lowenthal and was always on guard against another sexual advance.

Until mid-July 1989, Lowenthal evaluated Jordan as a good performing employee, giving her an "on plan" rating in a "mini-review" at that time and increasing her responsibilities.

Subsequently, in the presence of other Playtex employees, Lowenthal called Jordan by a term of endearment which implied a personal relationship which did not exist. Jordan was humiliated and admonished Lowenthal to never address her in that manner again. Thereafter, in late July of 1989, Jordan reported the pattern of sexual harassment and abuse to the Manager of Playtex's Human Resources Department, who, at the direction of Playtex Management, advised Lowenthal of the complaint, but at no time made any investigation nor took any remedial steps.

On July 25, Lowenthal announced to Jordan that she had to purchase her stock by August 4th, although the stock purchase plan did not prescribe a deadline. Jordan produced her check by that date and received her stock certificate. A Playtex memo of August 4, 1989 confirmed that Jordan "has today purchased 100,000 shares of" stock.

On or about August 14, 1989, Plaintiff was notified by her bank of an error in transfer of funds she had authorized for the stock purchase, and she asked the appropriate official of Playtex, Stammer (its Assistant General Counsel) to have the check redeposited when it was returned. Stammer agreed to this and advised her that he would tell the Treasurer to redeposit the check.

On August 16, 1989, Jordan received from Lowenthal an unscheduled review of her performance entitled "Personal (*sic*) Performance" which negatively critiqued her work performance, and also attacked her character and integrity. The review stated that Jordan would have a 60 day probation period to turn around her alleged deficiencies. The drafts of the review indicate it was edited by Playtex management and that Lowenthal wanted to fire Jordan.

On August 17th, President Ronald Gordon of Playtex ("Gordon") ordered Lowenthal to attend a meeting with Jordan present to discuss the "review." In the course of the meeting, Jordan advised Gordon that Lowenthal had threatened to fire her several times and had been abusive toward her. Upon these remarks, Lowenthal exploded in rage. According to Jordan, he approached her with his fists raised in a threatening manner, calling her defamatory names. He encircled her chair from behind, close enough that Jordan believed he might strike her. Jordan stated that she was paralyzed with fear and that President Gordon was speechless, as both of them watched Lowenthal spin out of control. Lowenthal then told Gordon "I won't work with this woman." Gordon's version of the incident largely corroborated Jordan's. He agreed that Lowenthal "raised his voice, shook his hand or his finger, or as Kathryn thinks, his fist, might have been" [*sic*] and stated that he "had not seen that type of behavior in my career." Gordon testified that he had conferred with Chairman of the

Board Smilow[1] regarding the matter and it was decided that Jordan's employment should be terminated as it would be "the best thing for Kathryn and the company."

The day after the "review" meeting, Jordan was advised by Playtex that she, not Lowenthal, was to be fired. Human Resources Manager Fiorelli entered in Jordan's file that Lowenthal had not adequately documented the reasons for her termination.

Jordan had to meet with Lowenthal again on August 23, 1989 over both Jordan's and Fiorelli's objections. Jordan had sent a note to Gordon asking for physical protection. Jordan was without counsel. Fiorelli, who attended the meeting, observed in her notes that Lowenthal was "revengeful", "very emotionally volatile", "threatening in his speech and behavior." She also commented on management's authorization of Lowenthal's "rebuttal" as endorsing Lowenthal's continued "efforts to destroy Kathryn's credibility and reputation."

Jordan sought psychiatric counseling from psychiatrist Dr. Jeffrey Benezra at this time. Dr. Benezra testified in his deposition that the incidents at Playtex had been extremely traumatic for Jordan and that she was suffering from Post Traumatic Stress Disorder.

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[1] In 1989, Playtex was a privately held company. Its Chairman, Joel Smilow, had made $186 million from four successive leveraged buyouts of various Playtex businesses. Senior management was comprised of Smilow, Ron Gordon, Chief Executive Officer and operating President ("Gordon"), Mark Lowenthal, General Manager ("Lowenthal"), and William Heimerdigger, Director of Operations and Human Resources ("Heimmerdigger"). All were principal shareholders and had worked together at various predecessor entities of "Playtex."

On September 5th, 1989 Jordan was officially terminated—20 days after Playtex had promised her 60 days probation, probation being its customary practice.

In mid-September, 1989, Stammer notified her that Playtex had not, as it had promised her on August 14th, redeposited her check and that since her employment status had changed, they would not be redepositing it, and demanded return of the stock certificate.

Playtex then advised Jordan to obtain counsel. During the month of September 1989, Jordan consulted briefly with two attorneys regarding the severance package and her right to her stock. Both legal relationships were terminated by September 29, 1989, prior to any signing of severance or release documents. Playtex was aware that Jordan was without counsel and authorized her to continue searching for counsel.

Gordon, Heimerdigger and Stammer then began pressuring Jordan to surrender the stock and to sign the proposed severance agreement. In exchange for the alleged "benefits" of the severance package, Jordan was to forego all rights to sue Playtex. Management knew Jordan did not want to sign a release or surrender her stock.

On November 7th, Jordan was so physically and emotionally exhausted that she passed out on the way to an interview with a prospective employer and was taken to an emergency room.

On November 9, 1989, when Jordan was still without counsel, Heimerdigger demanded to know what Jordan intended to do about the release. Jordan made it clear she was not willing to sign it. Heimerdigger, who unbeknownst to Jordan had just exercised an option to purchase 350,000 shares, told Jordan that her shares were "worthless" and that the prospects for the company's sale were "virtually nil." Heimerdigger advised Jordan that his source for this

information was Chairman Smilow. Heimerdigger further told Jordan that if she did not sign the release she would be labeled as a "troublemaker" and be "blackballed" in her industry. Jordan, who was about to receive a job offer contingent upon a good reference from Playtex, thereupon consulted with President Gordon. Gordon advised her to sign the release because "as one friend to another, you never know." Jordan thereupon executed the release document.

On January 8, 1990 Jordan became employed at Chase Manhattan Bank.

In November 1990, Jordan went on full medical disability for three years. She was diagnosed as suffering from Multiple Sclerosis in 1992 that dated back "several years". An independent neuropsychiatrist, Dr. Leonard Diller, testified that he felt that "sexual harassment could have given rise to this stress related disorder."

In December 1991, it was publicly disclosed in the Wall Street Journal that Sara Lee had purchased 25% of Playtex, that Playtex had been in extended discussions for sale as early as 1988, and that Smilow and 20 top Playtex executives would become millionaires as a result of the acquisition. The price of shares publicly issued in 1993 was seven times the amount at which Plaintiff had purchased her shares, and in 1991 the initial public offering had been estimated to be at $13 per share, 26 times the price she had proffered for her shares.

In 1992, Plaintiff brought the action below, jurisdiction being based exclusively on diversity of citizenship (28 U.S.C. Sec. 1332). While the facts stated above were recited in the complaint, and the first and second amended complaints, they were all couched in terms of violation of state laws, *e.g.*, fraud, infliction of emotional injury, etc., without any claim of violation of Title VII. After the taking of extensive depositions, Plaintiff moved for leave to file a third amended

complaint to include a sexual harassment claim, without any new allegations of fact. Without any examination of the facts alleged and those testified to at depositions to determine whether they constituted sexual harassment in violation of Title VII, the Magistrate Judge recommended the denial of Plaintiff's motion for leave to amend the complaint (App. C1), and the granting of defendant's summary judgment motion (App. C2). The District Court agreed, though modifying the recommendations by ruling that there was an issue of fact as to coercion and fraud by Playtex in obtaining Plaintiff's release (App. B1, App. B2). The Second Circuit affirmed in an unpublished summary opinion. It did not demur on the existence of a factual issue re coercion, but in *dictum* stated that there was no factual issue re fraud (App. A). No Court assessed whether the facts alleged, and those testified to in depositions, constituted a prima facie showing of sexual harassment under federal law.

This appeal followed.

ARGUMENT

POINT I

The affirmance of a grant of summary judgment to a Defendant, without any court having considered whether the factual allegations of the complaint and the supporting evidence adduced during discovery presented a prima facie case of sexual harassment under Title VII, was in conflict with decisions of other courts of appeals (and of this Court) on the important question of whether relief should be denied to a party under a legal theory not enunciated in the complaint, though the ultimate facts to support such theory—unwelcome and rejected sexual advances,

> reported but never investigated, and immediate retaliatory discharge despite a probation period—had been alleged in the complaint and were substantiated in discovery.

The original and the two amended complaints had alleged facts which constituted violations of Title VII, though stated solely as violations of state tort law. Alerted that Plaintiff would seek leave to file a third amended complaint, realleging the same facts but stating them also as a violation of Title VII, Defendant moved for summary judgment. Denying Plaintiff's motion, and granting Defendant's motion for summary judgment, neither the District Court nor the Second Circuit addressed the issue of whether the facts alleged did indeed constitute a Title VII violation.

In so limiting Plaintiff to her previously enunciated theories of recovery, the Second Circuit decision was at issue with every other court of appeals that has spoken on the matter, so far as our research has disclosed. Under Rule 54 (c) of the Federal Rules of Civil Procedure, a court may award any relief appropriate under the circumstances alleged, for

> If the appellant has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer: the court will grant him the relief to which he is entitled under the facts pleaded.

Kansas City, St. L. & C. R. Co. v. Alton R. Co., 124 F. 2d 780, 783 (7th Cir., 1941, per Minton, C. J.). Accord, *Z Channel, Ltd. v. Home Box Office*, 931 F. 2d 1138, 1141 (9th Cir. 1991), and cases cited there; *Troutman v. Modlin*, 353 F. 2d 382, 385 (8th Cir., 1965); *Kahan v. Rosenstiel*, 424 F. 2d 161, 174 (3d Cir., 1970), *cert. den.*, 398 U.S. 950, sub. nom. *Glen Alden Corporation v. Kahan*, (1970). (The only exception, inapplicable here, is where alternative relief would be unfairly

prejudicial. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Gilbane Bldg. v. Federal Reserve Bank of Richmond*, 80 F. 3d 895, 901 (4th Cir., 1996)).

This Court, indeed, at least as far as constitutional claims are concerned, has ruled that under Rule 54 (c)

> *** a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one.

Holt Civil Club v. City of Tuscaloosa, 439 U.S. 60, 65, 66 (1978). We can conceive of no reason why this doctrine should be limited to constitutional claims.

The rule of 54 (c) also applies in cases granting or denying summary judgment, as here [*Vivid Investments v. Best Western Inn—Forsyth*, 991 F. 2d 690, 692 (11th Cir., 1993); *Davis v. Romney*, 490 F. 2d 1360, 1366-7 (3d Cir., 1974); *Hawkins v. Frick-Reid Supply Corporation*, 154 F. 2d 88, 89-90 (5th Cir., 1946)], without any other exception. *Schoonover v. Schoonover,* 172 F. 2d 526, 530 (10th Cir., 1949).

The decision below clearly conflicts with that of the Third Circuit, which has held that Rule 54 (c)

> *** requires that a court ascertain whether the plaintiffs are entitled to *any* remedy, not whether they have asked for the proper remedy. As long as the plaintiffs have stated a claim for relief, it is the court's obligation to grant the relief to which the prevailing party is entitled whether it has been specifically demanded or not. (Emphasis the Court's).

Kirby v. United States Government, 745 F. 2d 204, 207 (3rd Cir., 1984).

The Second Circuit below, however, completely failed to insure the fulfillment of what the Third Circuit in *Kirby, supra*, held was a court's *obligation* to grant the relief to which Plaintiff was entitled, *viz.*, judgment under Title VII.[2] For neither the District Court nor the Second Circuit ever considered whether Plaintiff was entitled to relief under Title VII on the basis of the facts alleged in the complaint and the first two amended complaints, as well as all the compelling facts adduced during discovery. This constitutes an important conflict upon an important issue, especially since Plaintiff's Title VII claim was quite viable.

POINT II

In view of the alleged coercion and fraud used by Playtex in obtaining Plaintiff's release, — *viz.*, the explicit threat of blackballing and defamation, and the

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[2] The Second Circuit may have confused the Court's obligation under Rule 54 (c) with its recent doctrine that it has "*** no *obligation* to review issues that are raised, but not independently and sufficiently developed, in an appellant's main brief." (Emphasis supplied). *Karibian v. Columbia University*, 14 F. 3d 773, 777, n. 1 (2d Cir. 1994). But the District Court had a Rule 54 (c) obligation, and the Second Circuit had an obligation to review its acts. *Karibian* itself is authority for a ruling that Playtex's acts constituted sexual harassment.

We further note that though only Lowenthal, Playtex's General Manager, did the actual harassing, Playtex's President and Board Chairman (also its major management stockholder) participated in the retaliatory discharge of Plaintiff, and its President participated in the alleged fraud and coercion in obtaining Plaintiff's general release. This would seem to dispose of the usually troublesome *alter ego* question, on which this Court recently granted certiorari in *Faragher v. City of Boca Raton*, No. 97-282, October Term, 1997. If otherwise, we submit, then this Court should grant certiorari in the case at bar because of the *alter ego* question subsumed within our Question No. 1.

> false representation that her stock was worthless —, Plaintiff's Title VII claim was still viable. Playtex's failure to investigate her claim of its General Manager's unwelcome and rejected sexual advances, and its immediate retaliatory discharge of Plaintiff before the end of her probation period, provided a *prima facie* case of Title VII violation, entitling her to go to trial on any material disputed issues of fact, notwithstanding her prior non-assertion of Title VII claims before the EEOC.

Though Plaintiff did not assert her remedies before the Equal Employment Opportunity Commission, such failure was not a jurisdictional disqualification. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The District Court had ruled that there was an issue of fact as to whether Playtex had obtained petitioner's release by coercion and fraud: fraud in falsely stating that the stock was valueless, coercion in the threat of blackballing if she not sign a release. Fraud and coercion, the fraud lulling her into inaction until after she learned the true facts after the expiration of the allowable EEOC filing period, and the fear of blackballing compelling inaction, should be enough to estop Playtex from asserting any defense of non-utilization of EEOC remedies.

The Second Circuit did not demur at the District Court's finding of the issue of coercion, which if ultimately resolved in favor of Petitioner should, under *Zipes*, be enough to excuse her failure to exhaust EEOC remedies. The Second Circuit stated in dictum that her fraud claim was without merit, relying on the theory that she never purchased the stock, though Defendant, in writing, had acknowledged that Plaintiff

had purchased the stock.[3] Though not vested, the stock would have vested had her employment continued, instead of being wrongfully terminated, and therefore she would have been entitled to the stock under the Second Circuit's own ruling in *Koufakis v. Carvel*, 425 F. 2d 892 (2d Cir. 1970). The Second Circuit's somewhat confusing dictum below fails to take into account that Playtex had told plaintiff different things at different times, and that she had had no way whatsoever of evaluating the true worth of her stock, since Playtex had been a close corporation.

Whether Playtex had committed *actionable* fraud, as opposed to fraud resulting in ultimately tolling limitations or creating an equitable estoppel, was never considered by the Second Circuit. And the cases are unclear as to whether there must be reasonable reliance, or any reliance, when fraud is used defensively. Some cases do not seem to require reasonable reliance [*e.g., Richardson v. Frank*, 975 F. 2d 1433 (10th Cir. 1991)], while others at least give lip service to this requirement [e.g., *Stark v. Dynascan Corp.*, 902 F. 2d 549 (7th Cir. 1990); *Rhodes v. Guiberson Oil Tools Div.*, 927 F. 2d 876 (5th Cir. 1991)].

Of course, reasonable reliance is not and cannot be a bar to assertion of coercion. And while the discovery of a fraud may perhaps start the statute of limitations running in an employment case [*Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446 (7th Cir. 1990)], the effect of coercion continues indefinitely—discovery of a fraud alerts, but coercion continues its cruelty and efficacy. Here, the asserted coercion—the threat of being blackballed in her industry if she

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[3] The Second Circuit ruled that, under New York law, the fact that the check was to be redeposited did not constitute a valid tender. But it ignored that Playtex waived whatever defect there might have been, by agreeing to accept the check for redeposit.

did not sign the release—was found by the District Court to present an issue of fact, and the Second Circuit simply ignored this issue in its opinion, so that the Plaintiff's claim of coercion is still viable. Therefore, Playtex should not have been awarded summary judgment.

Playtex did not merely present a hostile work environment. It was plainly hostile to any claim of sexual harassment. There is nothing in the record to show that Playtex had any policy or procedures in place to handle sexual harassment claims. When confronted by petitioner's claim that its General Manager had been sexually aggressive towards her, Playtex's response was not one of investigating her complaint and taking appropriate remedial action. Instead, it helped her harasser prepare an unscheduled and adverse personnel evaluation of her, and then plunged her into a confrontational meeting with her harasser. When her harasser retaliated by demanding that Playtex fire her, Playtex, apparently deciding that General Manager Lowenthal was more valuable to it than petitioner,[4] Playtex fired petitioner—the victim—not Lowenthal.

What apparently began as a case of quid pro quo sexual harassment ended in a hostile environment situation that could not possibly have been more hostile. Accordingly, we do not digress on which of the tests of Title VII should be applicable, the quid pro quo test, and if so the parameters thereof [on which see the discussion of the Ninth Circuit in *Nichols v. Frock*, 43 F. 3d 503 (9th Cir., 1994)], or the hostile work environment test. Moreover, we are not so timorous as to assert that Plaintiff is automatically entitled to summary judgment, but believe that she has earned the right to a trial, and that it would be premature to ask this Court to grant her

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[4] Said President Gordon, in discussing the more reasonable option of relocating Plaintiff within Playtex instead of terminating her: "Where else am I going to move you? He's the General Manager of the company."

more relief than that at this time.[5] The relief we request is that, upon the grant of certiorari, the judgment below be vacated, and the case ordered to be tried.

****

In closing, we note that if the decision below stands, it will be a beacon light for immunity from Title VII to all employers faced with a sexual harassment claim. For Playtex will have found the path to render the statute nugatory: do not investigate the complaint of harassment, or take appropriate remedial action to protect the reported victim, instead assist the alleged harasser in preparing an adverse employment review on the victim, immediately convene a forced and predictably explosive confrontation between accuser and accused, whereupon management can conveniently conclude that harasser and victim cannot work together and, upon the harasser's demand, fire the victim—ostensibly for her own good. Then simply threaten to blackball and defame the victim so that she surrenders her right to obtain legal redress from the defendant for the very violations the statute seeks to prevent. We may never know whether this Playtex path was the outcome of a clever plan, or whether it was merely stumbled upon. But whichever it was, it must not be upheld, especially when such violates Rule 54 (c).

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[5] A jury would be entitled to determine the likelihood of continuation of employment, absent the harassment, even though there was no contract of employment, in determining damages. *Koufakis v. Carvel*, 425 F. 2d 892 (2d Cir. 1970), *supra*, p. 15

CONCLUSION

This Court should grant certiorari, the judgment below should be vacated, and the case remanded for trial.

Respectfully submitted,

HERBERT MONTE LEVY
Attorney for Petitioner
60 East 42 Street
Suite 4210
New York, New York 10165
(212) 370-4950

Dated: New York, New York
February 11, 1998

APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

SUMMARY ORDER

UNITED STATES COURT OF APPEALS
FILED: JUN 12 1997
GEORGE LANGE III, CLERK
SECOND CIRCUIT/stamp

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June one thousand nine hundred and ninety-seven.

PRESENT:

Hon. John M. Walker, Jr.,
Hon. Joseph M. McLaughlin,
Hon. Fred I. Parker,
Circuit Judges.

No.96-7431

KATHRYN C. JORDAN,

Plaintiff-Appellant,

v.

PLAYTEX FAMILY PRODUCTS, INC.,

Defendant -Appellee.

APPEARING FOR APPELLANT:

Ralph A. Siciliano
Newman Tannenbaum Helpern Syracuse
& Hirschtritt LLP
New York, New York

APPEARING FOR APPELLEE:

Chase T. Rogers
Cummings & Lockwood
Stamford, Connecticut

ISSUED AS MANDATE 9-25-97/stamp

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut (Thompson, J.) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Plaintiff-appellant Kathryn C. Jordan appeals from the grant of summary judgment to defendant-appellee Playtex Family Products, Inc. We review the district court's grant of summary judgment *de novo*. *Sutera v. Schering Corp.*, 73 F.3d 13, 15 (2d Cir. 1995).

Appellant's two claims for breach of the stock agreement giving her the option to purchase stock in Playtex, with partial vesting after one year, were properly dismissed. Appellant tendered an invalid check in payment for the stock. Under New York law, the law governing the contract, a dishonored check is "not a valid payment, and [a] subsequent direction to redeposit [is] not a valid tender." *Rawcliffe v. Aguavo,* 438 N.Y.S.2d 697, 699 (Sup. Ct. 1981). The stock agreement states that Playtex may repurchase all of appellant's shares at her purchase price if she is employed for less than one year. Even assuming appellant purchased the stock, the severance agreement signed by appellant (after receiving advice from two attorneys retained by her to interpret the stock agreement) expressly provides for the return of her check and the buy back of her stock.

Appellant's claim that Playtex breached the duty of good faith and fair dealing implied in the stock agreement by terminating her in violation of a public policy against retaliatory discharge was properly rejected by the district court. Although appellant's complaint is confusing and her theory appears to shift over time, it appears that appellant currently argues that she was terminated in retaliation for complaining about sexual harassment and this resulted in deprivation of her (unvested and unexercised) stock rights. Appellant argues New York law applies to this claim. In New York, stock agreements of the type at issue in this case are strictly construed, and there is no basis for appellant's claim. *See Gallagher v. Lambert,* 74 N.Y.2d 562, 566 (1989) (interpreting prior cases as holding that at-will employee

acquires no rights against firing from stock agreement); *Wakefield v. Northern Telecom. Inc.*, 769 F.2d 109, 113 (2d Cir. 1985) (limiting implied good faith covenant in contract for commissions to situations where discharge was to avoid payment of commissions and did not extend to arbitrary, unjustified firings for other reasons).

Appellant's claim for intentional infliction of emotional distress is without merit. The district court correctly found that the exclusivity provision of Conn. Gen. Stat. § 31-284(a) (as applicable to events occurring prior to 1993) bars common law actions for injuries suffered during the course of employment. *See Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 106 (1994); *Claps v. Moliterno Stone Sales Inc.*, 819 F. Supp. 141, 151-52 (D. Conn. 1993) (Cabranes, J.). Appellant fails to make any showing that her supervisor was the alter ego of the corporation, *see Suarez*, 229 Conn. at 106; *Claps*, 819 F. Supp. at 152 (discussing Connecticut cases), or that Playtex engaged in intentional conduct supporting "an inference that the employer deliberately instructed an employee to injure [her]self." *Suarez*, 229 Conn. at 110 (internal quotations omitted).

We agree with the district court that appellant's evidence concerning Playtex's actions in terminating her, and its actions after her termination, were insufficient to support a reasonable jury finding that Playtex's conduct was extreme and outrageous. *See Petyan v. Ellis*, 200 Conn. 243, 254 (1986). At most, viewing the inferences to be drawn from the facts in the light most favorable to appellant as we must on summary judgment, but not crediting mere conclusory speculation, appellant was terminated instead of the person who allegedly harassed her with inappropriate comments and gestures directed toward her, and was verbally pressured by executives, who allegedly mentioned she might be "blackballed" in the industry, to sign a release and a severance agreement (after

being advised by the company to retain independent counsel and receiving the advice of at least three independent lawyers). We agree with the district court that her claim is insufficient to survive summary judgment. *See id.* at 245, 254 & n.5 (holding that allegedly defamatory statement that person was fired for fraud and lying insufficient).

The district court properly concluded that appellant's claim for negligent hiring and retention of unfit personnel was without merit. Allegations of negligence are well within the purview of Conn. Gen. Stat. § 31-284(a). *Perille v Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 533-34 (1985). Moreover, appellant's complaint was filed at least three years after the alleged injury, well beyond the applicable two year statute of limitations contained in Conn. Gen. Stat. § 52-584 for injuries caused by negligence.

The fraud claim is without merit because even assuming that an executive's statements to appellant regarding the minimal value of the stock were false (and assuming she could overcome her clear failure to prove she was induced to act on the statement in light of 1) her testimony that she believed the statement was "a bunch of baloney," (J.A. at 217), 2) she knew the sale of the company was discussed "all the time," (id.), 3) her complaint's allegation that she took a greatly reduced salary because of the option to purchase stock, and 4) her testimony that a person she speculates was an "alter ego" of the company told her that the stock may "be worth a lot of money," a fact she pointed out to the allegedly lying executive when he said her stock option was worthless, (J.A. at 219)), she never purchased the stock and her right to keep any stock never vested. Her challenge to the order bifurcating discovery is frivolous in light of her lack of a right to the stock and her counsel's agreement to the order.

The district court did not abuse its discretion in denying appellant's request for leave to file a third amended complaint.

Appellant had a long period of time to include the counts in a prior amendment, the motion to amend was filed two months after discovery closed and eight days prior to Playtex's summary judgment motion, and the district court found the request was not made in good faith. "In all the circumstances, we see no abuse of discretion in the denial of the motion." *Creswell v. Sullivan & Cromwell,* 922 F.2d 60, 72 (2d Cir. 1990).

We have considered all of appellant's contentions on this appeal and have found them to be without merit. For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

John M. Walker/signature
Hon. John M. Walker, Jr., U.S.C.J.

Hon. Joseph M. McLaughlin/signature
Hon. Joseph M. McLaughlin, U.S.C.J.

Hon. Fred I. Parker/signature
Hon. Fred I. Parker, U.S.C.J.

NOTICE

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Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543
Telephone Number 202-479-3000

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pc/opn/f
disp/cc/iss

APPENDIX B1

KATHRYN C. JORDAN

Plaintiff

v.

PLAYTEX FAMILY PRODUCTS, INC.

Defendant.

Civil No. 5: 92cv655 (AWT)

ENDORSEMENT ORDER

Upon review and pursuant to 28 U.S.C. § 636(b)(l)(A) and Rule 2 of the Local Rules for United States Magistrate Judges (D.Conn.), Magistrate Judge Smith's Ruling on Plaintiff's Motion for Leave to file an Amended Complaint [Doc. #204] is APPROVED and ADOPTED.

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of September, 1995.

Alvin W. Thompson/signature
Alvin W. Thompson
U.S. District Judge

APPENDIX B2

United States District Court

DISTRICT OF CONNECTICUT

KATHRYN C. JORDAN,

Plaintiff,

v.

PLAYTEX FAMILY PRODUCTS, INC.

Defendant.

Civil No. 5: 92CV655

ENDORSEMENT ORDER

Magistrate Judge Smith's Recommended Ruling on Motion for Summary Judgment [Doc. #211] is hereby ACCEPTED with the following modifications:

(i) The analysis in Part III C. divides the conduct into alleged pre-termination conduct and alleged termination and post-termination conduct. While the court agrees with the Magistrate Judge's analysis, the court also concludes that, taken together, the alleged pre-termination, termination and post-termination conduct is not, as a matter of law, sufficient to constitute intentional infliction of emotional distress under Connecticut common law .

(ii) The court does not adopt footnote 8. *See* Recommended Ruling at 21. Moreover, with respect to the issue of the release, genuine issues of fact do exist as to whether the release was signed under duress and whether it

was obtained as a result of a fraudulent misrepresentation; however, those issues are not material given the court's conclusions with respect to the other grounds for summary judgment.

(iii) The court notes that in her objection to the recommended ruling, the plaintiff refers (at page 2 of the objection) to the Magistrate Judge's "purported recitation of disputed and undisputed facts." For the record, it should be clear that Part I of the recommended ruling contains "undisputed facts." It should also be noted, for the record, that unsupported conclusory allegations, no matter how specific, will not suffice in opposition to a motion for summary judgment.

The court also notes that some of the evidence the plaintiff attempts to rely on at this point in the case would have been material to the counts sought to be added in June of 1994 in her proposed amended complaint, but that such evidence is not a sufficient basis to deny the defendant's motion for summary judgment on the counts that are in the actual complaint. The plaintiff neglected to request leave to file that proposed amended complaint on a timely basis. (See docs. #204 and #219.)

Accordingly, the defendant's motion for summary judgment is GRANTED with the modifications set forth above.

It is so ordered.

Dated at Hartford, Connecticut this 18th day of March, 1996.

Alvin W. Thompson/signature
Alvin W. Thompson
United States District Judge

United States District Court

DISTRICT OF CONNECTICUT

MAR 19 5 47 PM '96/stamp
U.S. DISTRICT COURT/stamp
HARTFORD, CONN.

CASE NO. 5:92CV-655(AWT)

KATHRYN C. JORDAN

v.

PLAYTEX FAMILY PRODUCTS

JUDGMENT

This action having come on for consideration of the defendant's motion for summary judgment before the Honorable Thomas P. Smith, United States Magistrate Judge, and the Honorable Alvin W. Thompson, United States District Judge and,

The Honorable Thomas P. Smith having considered the motion and the full record of the case including applicable principles of law, and having granted the motion in a Recommended Ruling on Motion for Summary Judgment and the Court having Accepted it, it is hereby

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered in favor of the defendant.

Dated at Hartford, Connecticut, this 19th day of March, 1996.

KEVIN F. ROWE, Clerk

By Robin D. Tabora/Signature
Robin D. Tabora
Deputy in Charge

APPENDIX C1

United States District Court

DISTRICT OF CONNECTICUT

FILED: Nov 18 4 07 PM '94/stamp

CIVIL NO. 5:92-655 (TFGD)

KATHRYN C. JORDAN,

Plaintiff,

v.

PLAYTEX FAMILY PRODUCTS, INC.,

Defendant.

RULING ON MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

The plaintiff has moved to file a third amended complaint seeking to add counts alleging negligent infliction of emotional distress, negligent misrepresentation, sexual harassment, and wrongful discharge. For the reasons stated below, the motion should be denied. Fed.R.Civ.P. 15(a).

I. FACTS

On November 9, 1992, the plaintiff filed her initial complaint. According to the complaint, the defendant hired the plaintiff in March 1989 as Vice President, Business Manager of the Beauty Care Products Group. The plaintiff maintains that she decided to accept employment from the defendant because she was promised the option to purchase 100,000

shares of the defendant's stock at a price of 50 cents per share. (Compl. ¶¶ 6-8). The complaint alleged that the plaintiff was sexually harassed by her immediate superior while an employee of the defendant; however, no count seeking legal relief for this was included. (Id. at ¶ 7). The defendant discharged the plaintiff. (Prop. Third Amend. Compl. ¶ 8). The plaintiff further alleges that the defendant failed to cash the $50,000 check proffered by her to make the stock purchase thereby preventing the exercise of her options. (Compl. ¶ 11,12).

The complaint contained the following counts: (1) breach of contract; (2) intentional infliction of emotional distress; (3) fraud and (4) violation of the Connecticut Unfair Trade Practices Act ("CUTPA").

On December 3, 1992, the plaintiff filed her first amended complaint. In this complaint she added a count alleging negligent hiring and retention of unfit personnel. On March 3, 1992, the plaintiff filed her second amended complaint which removed the count based on CUTPA.

On April 15, 1994, discovery closed in this case.

On June 16, 1994, two months after discovery closed, the plaintiff filed this motion seeking leave to file a third amended complaint which contains four new counts. These counts are: (1) negligent infliction of emotional distress in violation of Connecticut common law (count five); (2) negligent misrepresentation in violation of Connecticut common law (count eight); (3) sexual harassment in violation of 42 U.S.C. § 2000e *et seq*. (count nine); and (4) wrongful discharge in violation of Connecticut common law (count ten). The original counts and the factual allegations remain essentially the same in the proposed amended complaint.

On June 21, 1994, the defendant filed a motion for summary judgment under Rule 56(c) of the Federal Rules of

Civil Procedure seeking to dismiss the second amended complaint.

II. STANDARD

Under Rule 15(a) of the Federal Rules of Civil procedure, permission to file an amended complaint should be freely granted when justice so requires. *Foman v. Davis,* 371 U.S. 178, 182 (1982). Permission may be denied, however, if the party seeking to amend has delayed impermissibly or if the amendment would be unfair or unduly prejudicial.

III. DISCUSSION

The plaintiff maintains that she should be permitted to file the amended complaint because: (1) the delay in seeking leave was not impermissibly long; (2) no additional discovery would be required; and (3) the factual allegations upon which the new counts are based have long since been known to the defendant and no undue prejudice will result.

The defendant responds that the motion for leave to file the amended complaint should be denied because: (l) the period for discovery is closed and the new counts will require additional discovery; (2) the delay will unduly prejudice the defendant; and (3) leave to file would be "futile" because the additional counts legally insufficient.

The court concludes that the motion for leave to file the amended complaint should be denied for the following reasons.

First, as noted above, the discovery period expired on April 15, 1994, two months before the motion for leave to amend was filed. Normally, amendments should be made by this time and the case set down for trial. This motion does not involve a situation in which the plaintiff discovered facts supporting a new legal theory.

Second, the common nucleus of facts upon which the proposed additional counts are based was long since known to the plaintiff. The new counts concern allegations involving working conditions and the stock option proposal. This was alleged by the plaintiff in her original complaint. As the plaintiff's counsel acknowledges, no new material factual allegations are involved. (Asche Aff. at p. 2). Hence, the plaintiff had ample time to include these counts in an amended complaint.

Third, the court finds that, should the motion for leave to file the amended complaint be granted, additional discovery will be necessary. This strongly militates against granting leave. *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60, 72 (2nd Cir. 1990).

Fourth, the court finds that the plaintiff was aware that the defendant had been planning to file a motion for summary judgment. The plaintiff should have filed for leave prior to that time so that the court would only have to consider one motion for summary judgment. If leave is granted, the defendant will in all likelihood be forced to file an additional motion for summary judgment directed at the new counts. This is unacceptable. "A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." *State Trading Corp. of India Ltd. v. Assuranceforeningen Skuld,* 921 F.2d 409, 418 (2d Cir. 1990) (*citing Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967)).

Finally, the interests of justice are important. Rule 15 makes it plain that "justice" is to be factored into the court's determination, and that the court has the responsibility to insure that the rule not be used as an instrument of inequity and injustice. "Leave to amend should be freely granted when *justice requires." Nigrelli v. Catholic Bishop of Chicago,* 794 F.Supp. 246, 248 (N.D. Ill. 1992) (emphasis added) (*citing*

Zenith Radio Corp. v. *Hazeltine Research. Inc.*, 401 U.S. 321 (1971)). Although the cases are legion reversing decisions denying leave to amend, an occasional trial court still withholds Rule 15 relief where it is convinced that it would be unjust to do otherwise. *See e.g., Williams v. Brooklyn Union Gas Co.*, 819 F.Supp. 214, 223 (E.D.N.Y. 1993). This is just such a case.

Justice plainly does *not* require that leave be granted. Plaintiff's actions since the beginning of this suit leave this magistrate unable to characterize plaintiff's Rule 15 motion as a "good faith" request for relief. Rather, the magistrate finds it to be yet another act deliberately timed and designed to disrupt defendant's defense and to increase the already excessive costs that defendant has incurred in defending this action. The defendant, on the other hand, has consistently played by the rules. The defendant deserves closure. To grant the instant motion would be unfair and unjust in the circumstances of this case.

IV. CONCLUSION

For the above reasons, the motion for leave to file amended complaint **(filing 153)** should be denied.

Either party may seek review of this as provided in 28 U.S.C. § 636; Federal Rules of Civil Procedure 6(a), 6(e), & 72; and Rule 2 of the Local Rules for United State Magistrate Judges (D. Conn.). Failure to object in a timely manner may preclude further review. *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

Dated at Hartford, Connecticut this 18th day of November, 1994.

Thomas P. Smith/signature
THOMAS P. SMITH
U.S. MAGISTRATE JUDGE

APPENDIX C2

United States District Court

DISTRICT OF CONNECTICUT

CIVIL NO. 5:92-655 (AWT)

KATHRYN C. JORDAN,

Plaintiff,

v.

PLAYTEX FAMILY PRODUCTS, INC.,

Defendant.

RECOMMENDED RULING ON MOTION FOR SUMMARY JUDGMENT

Before the court is the defendant's motion for summary judgment. The plaintiff alleges that, while employed by the defendant, she was sexually harassed by an employee of the defendant, defrauded out of a stock option, and coerced into signing a release. She brings claims asserting: (1) breach of contract (counts one and two); (2) breach of duty of good faith and fair dealing (count three); (3) intentional infliction of emotional distress (count four); (4) negligent hiring and retention of unfit personnel (count five); and (5) fraud (count six). The plaintiff requests: (1) legal damages; (2) punitive damages; (3) recision of a release; (4) interest; (5) costs; and (6) attorneys' fees.

For the reasons stated below, the motion for summary judgment should be granted.

I. FACTS

The court, after an examination of the second amended complaint (the "complaint"), affidavits, Local Rule 9 statements, and other pleadings filed concerning the motion, finds the following undisputed facts. In March 1989, the defendant hired the plaintiff to serve as Vice-President, Business Manager of the defendant's Beauty Care Products Group. On April 3, 1989, she began working for the defendant. Compl. ¶ 6.

The parties entered into a contract, the Management Contribution and Subscription Agreement ("MCSA"), which governed the parties' rights with respect to the defendant's stock. Def.'s St. ¶ 11. Under the MCSA, the defendant offered the plaintiff the option to purchase 100,000 shares of the defendant's stock at $.50 per share, for a total investment of $50,000. Compl. ¶ 7; Def.'s St. ¶ 9. Section 6 of the MCSA sets forth a five-year vesting schedule which provides that if termination of employment occurred prior to the end of the first year of employment, the defendant could reacquire all of the stock because the employee would not have vested in any portion of the stock. Def.'s St.¶ 13. Section 15 of the MCSA states:

> 15. *No Right to Continue in Employment.* Nothing in this Agreement shall confer upon the Purchaser any right to continue in the employ of Group or any of its subsidiaries or shall interfere with or restrict in any way the rights of the Group and its subsidiaries, which are hereby expressly reserved, to discharge the Purchaser at any time for any reasons whatsoever, with or without good cause.

Def.'s St. ¶ 14.

The plaintiff's immediate supervisor was Mark Lowenthal. Compl. ¶ 8; Def.'s St. ¶ 5. The plaintiff alleges that Lowenthal sexually harassed her. Compl. ¶ 8. Lowenthal and the defendant deny that he ever harassed the plaintiff. The plaintiff alleges that Lowenthal was terminated from prior employment for similar behavior. Compl. ¶ 8. Lowenthal denies this. According to the plaintiff, the defendant knew or should have known of Lowenthal's prior alleged history of sexual harassment. Compl. ¶ 9. The plaintiff asserts that as a result of the alleged harassment and intimidation by Lowenthal, she suffered severe emotional distress. She claims to have required psychological counseling over an extended period of time and has been diagnosed as suffering from post traumatic stress disorder as a direct result of the harassment. Compl. ¶ 11.

On July 25, 1989, Lowenthal wrote a memorandum to the plaintiff in which he stated, "if you intend to purchase the 100,000 shares of FP common stock offered to you on April 14, please make all the necessary arrangements by Friday, August 4, 1989. Failure to do so may result in the loss of your option to do this in the future." Def.'s St. ¶ 15. On August 4, 1989, the plaintiff gave a check to the defendant in the amount of $50,000 for the purchase of 100,000 shares of stock. Def.'s St. ¶ 16. The check was returned for "insufficient funds." Def.'s St. ¶ 18; Compl. ¶ 11. The defendant never redeposited the check for collection. The defendant gave the plaintiff physical possession of the stock certificates. The unrebutted assertion of the defendant is that this was done because it was assumed that the check would clear.

On August 16, 1989, Lowenthal gave the plaintiff a Personal Performance Assessment (the "review") which described work-related deficiencies that Lowenthal and others observed in the plaintiff. Def.'s St. ¶ 21. The plaintiff asserts that the review was knowingly false. Jordan Aff. at pages 11-12.

On August 16, 1989, the plaintiff met with Lowenthal and Ron Gordon, the defendant's Chief Executive Officer to discuss the review. Def.'s St. ¶ 22. The plaintiff alleges that at this meeting Lowenthal treated her in a physically and sexually abusive manner. Compl. ¶ 12. The defendant admits that a heated conversation took place at the meeting and that he raised his voice, shook his hand or finger at the plaintiff, called her a liar, and stated that he would not work with the plaintiff any more and abruptly left the meeting. Def.'s St. ¶ 23. The plaintiff concedes that he never physically touched her. Jordan Dep'n. at 622-623. The plaintiff also concedes that Gordon was "appalled" by Lowenthal's behavior and that Joel Smilow, the defendant's Chairman of the Board, apologized for his behavior. Jordan. Aff. at pages 12-13.

The defendant terminated the plaintiff, effective September 4, 1989. Def.'s St. ¶ 26. The defendant offered the plaintiff a settlement agreement in which the defendant would provide the defendant's standard benefits package of up to six months of benefits and compensation beginning September 4, 1989. Def.'s St. ¶ 28. The defendant proposed that the plaintiff sign a release in exchange for the benefits. Def.'s St. ¶ 29. A release was attached to the proposed agreement. It stated:

> You . . . hereby fully release and discharge [the defendant] . . . from any and all claims, demands, causes of action or liabilities, whether known and unknown, suspected or unsuspected, which you have had, now have, or may hereafter have by reason of any matter arising up to the execution of this agreement, against [the defendant]. . . . This release includes any claim related to your employment with or separation from [the defendant] and applies to any right which you may have to commence or maintain a charge or action alleging sex or other discrimination under any federal, state, or local statute (whether before a court or an administrative agency) or to commence or maintain a claim or action alleging wrongful

termination, breach of contract, commission or tort, or any combination thereof. . . .

Def.'s St. ¶ 32. On or about October 21, 1989, the plaintiff signed a copy of the release conditioned on certain changes being made in a severance agreement the defendant had previously prepared. Pl.'s St. ¶ 28. On or about November 9, 1989, the plaintiff again signed the release and severance agreement. Pl.'s St. ¶ 30; Def.'s St. ¶ 45.

The plaintiff asserts that throughout the fall of 1989 she was in an extremely over-wrought emotional state and was seeing two psychotherapists. Pl.'s St. ¶ 32. The plaintiff states that she signed the November 9 release because William Heimerdinger, Vice President for Human Resources, told her that he believed the stock had no value and that the sale of the stock was unlikely. The plaintiff asserts that as a shareholder in a privately held corporation, she had no choice but to rely on Heimerdinger's representation. Pl.'s St. ¶ 34. She alleges that Heimerdinger's statement was knowingly false when made. Pl.'s St. ¶ 37. In addition, Heimerdinger allegedly told the plaintiff on November 9 that if she refused to sign the release she, would be known as a trouble-maker and would be "blackballed" in the marketing industry. Pl.'s St. ¶ 40. The plaintiff took this to mean that if she did not sign the release, the defendant would prevent her from working in the industry again. *Id.*

On November 3, 1989, Lowenthal ceased employment with the defendant.

On November 9, 1992, the plaintiff filed this complaint in district court.[1]

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[1] Currently before the district judge is an objection to this court's denial of the plaintiff's motion for leave to file an amended complaint which would add a count based on Title VII of the Civil Rights Act of 1964.

II. STANDARD

Federal Rule of Civil Procedure 56(c) states in pertinent part, "the motion [for summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." In *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986), the Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery upon motions, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." All ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. *Eastway Constr. Corp. v. City of New York,* 762 F.2d 243, 249 (2d Cir. 1985), *cert. denied,* 484 U.S. 918 (1987).

On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Cronin v. Aetna Life Ins. Co.,* 46 F.3d 196, 203 (2d Cir. 1995) (citing *Donahue v. Windsor Locks Board of Fire Commissioners,* 834 F.2d 54, 58 (2d Cir. 1987)).

III. DISCUSSION

A. BREACH OF CONTRACT, COUNTS ONE AND TWO

The plaintiff bases two breach of contract counts on the defendant's alleged breach of the contractual provision giving her the right to purchase the stock.

Although there are disputes concerning the stock option, it is undisputed that the offer to purchase stock was to be

accepted by payment. Although the MCSA does not specify the time in which the plaintiff was to exercise the option, she had a "reasonable" time to do so.[2] *Chicago Tribune Co. v. N.L.R.B.*, 965 F.2d 244 (7th Cir. 1992). On August 4, 1989, the date that Lowenthal's letter purported to set as a deadline for accepting the option, the plaintiff tendered a check for the stock. The check was returned for insufficient funds. The plaintiff did not replace the check or otherwise make payment. Accordingly, the offer has long since expired.[3]

Under New York law, a dishonored check does not constitute valid payment and a subsequent direction to redeposit is not a valid tender. *Rawcliff v. Aguayo,* 108 Misc.2d 1027, 1029, 483 N.Y.S.2d 697, 699 (1981). A party cannot create an issue of fact by asserting that the offerer's intent was for acceptance to be by promise when the contract indicates otherwise. Therefore, the court finds that the plaintiff did not accept the offer to purchase the stock.

Moreover, the MCSA did not create an obligation to keep the contract open for a longer period of time. It explicitly states that the right to purchase the stock did not give the plaintiff any additional rights. That the defendant gave the plaintiff physical possession of the stock certificates is not sufficient to constitute ownership of the stock. Accordingly, counts one and two should be dismissed.

B. BREACH OF CONTRACT, COUNT THREE

1. Violation of Public Policy

The plaintiff contends that when the defendant terminated

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[2] The MCSA provides that New York law governs the performance and interpretation of the contract. MCSA § 13.

[3] Hence, it is a not a material issue of fact whether Lowenthal's July 25, 1989 letter created a fixed deadline for acceptance.

her, it violated an important public policy by firing her in order to appease her supervisor. Pl.'s Br. at 26. The plaintiff relies on *Sheets v. Teddy's Frosted Foods. Inc.*, 179 Conn. 471 (1980). In general, Connecticut law recognizes the principle of employment-at-will such that "contracts of permanent, or for an indefinite term, are terminable at will." *Id.* at 474.

Although both State and federal civil rights law evidence a strong public policy against the actions which Lowenthal and the defendant allegedly engaged in, the exception drawn by *Sheets* is a narrow one. Courts in this State are reluctant to extend it to situations such as the one at bar. In *Neshewat v. General Dynamics Corp.*, 2:92cv38(AVC) (D. Conn. April 1993), the plaintiff, an individual of Jordanian descent, claimed that the defendant terminated him on the basis of his nationality. He argued that this violated a strong public policy against discrimination. The court stated:

> Federal courts in this district and the Connecticut Appellate Court have held that actions for wrongful discharge that arise out of wrongful discrimination are preempted by the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. §§ 46a-51 et seq. . . . *See, e.g., Napoleon v. Xerox Corp.*, 656 F. Supp. 1120, 1125 (D. Conn. 1987); *Atkins v. Bridgeport Hydraulic Co.*, 5 Conn. App. 643 (1985).

Id. at 15. Accordingly, the court finds that the plaintiff cannot maintain a suit for wrongful termination.

2. Breach of Duty of Good Faith and Fair Dealing

The plaintiff further maintains in count three that her employment with the defendant created an implied duty of good faith such that the defendant could not fire her at will. The defendant points to the employment-at-will doctrine and

the MCSA which explicitly states that the plaintiff was an at-will employee.

As stated above, under Connecticut common law, "contracts of permanent employment, or for an indefinite term, are terminable at will." *Sheets,* 179 Conn. at 474.

Most significantly, in the case at bar, the plaintiff signed a contract which explicitly gave the defendant the right to dismiss "the Purchaser at any time for any reasons whatsoever, with or without good cause." MCSA § 15.

Therefore, the court finds that the plaintiff was an at-will employee and that the defendant had the right to terminate her at any time.

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In count four, the plaintiff asserts that the defendant committed the tort of intentional infliction of emotional distress. The foundation for this would appear to be: (1) Lowenthal's alleged behavior; (2) the alleged negligent hiring and retention of Lowenthal; (3) the review; and (4) the statements made to her in order to obtain the release. Therefore, the actions complained of are pre and post-termination. She asserts that the defendant is liable for the actions of its employees. The defendant moves for summary judgment arguing that: (1) the count is barred by the exclusivity provision of the Workers Compensation Act ("WCA"); and (2) the count fails to state a claim for which relief may be granted.

The tort of intentional infliction of emotional distress requires the following elements: (1) that the defendant intended to inflict emotional distress or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the

defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. *Petyan v. Ellis,* 200 Conn. 243, 253 (1986).

The determination of whether, in the first instance, the plaintiff meets the requirements for the tort of intentional infliction of emotional distress is a matter of law and, should the court determine that said claim fails as a matter of law, it may deny relief prior to a jury's determination.[4]

The tort of intentional infliction of emotional distress requires the plaintiff to show that the defendant engaged in "extreme and outrageous" conduct. This is defined as conduct "exceeding *all bounds* usually tolerated by decent society, of a nature which is especially calculated, and does cause mental distress of a very serious kind." *Ziobro v. Connecticut Inst. for the Blind,* 818 F. Supp 5O2, 503 (D. Conn. 1993) (quoting *Petyan v. Ellis,* 200 Conn. 243 n.5 (quoting Prosser & Keeton, Torts (5th ed.),.), Section 12, at 60)).

In *Ziobro,* the court stated:

The court concludes that the conduct alleged by the plaintiff does not satisfy this test. The plaintiff has alleged that the defendants failed to conduct an adequate investigation before dismissing her; the plaintiff has also alleged that the defendants knew or should have known when they dismissed her that the dismissal was not justified. . . . the defendant's conduct is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Restatement (Second) of Torts Section 46, comment (d) (1965).

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[4] *See Ziobro v. Conn. School for Blind,* 818 F. Supp. 502, 503 (D. Conn. 1993); *Reed v. Signode,* 652 F. Supp. 129 (D. Conn. 1986); *Kintner v. Nidek-Torin,* 662 F. Supp. 112 (D. Conn. 1987).

Id. (concluding that, even if proven, allegations of unjust termination and termination without adequate investigation fail to satisfy the "extreme and outrageous standard").

1. Pre-Termination Conduct

In *Claps v. Moltinero Stone Sales, Inc.*, 819 F. Supp. 141, 151 (D. Conn. 1993) (Cabranes, J.) , the court explained the operation of the exclusivity provision of the WCA in the context of an intentional tort:

The CWCA establishes broad protection for employers against liability for injuries suffered by employees during the course of employment. *See* Conn.Gen.Stat. § 31-284(a).). Under this statute, an employer is generally entitled to view the commission of an intentional tort--even by a supervisor or foreman--as "an injury arising out of or in the course of employment, 'another industrial mishap in the factor' "of the sort exclusively covered by the workers' compensation system. *See Jett v. Dunlap,* 179 Conn. 215, 218, 425 A.2d 1263 (1979). The Connecticut Supreme Court has held, however, that an employer is liable for intentional torts committed by an employee if (1) the employer "directed or authorized" the employee to commit the tort or (2) the employee who committed the tort is an "alter ego" of the corporation. *See id.* at 218-219, 425 A.2d 1263.

In articulating these exceptions, the Court emphasized that an employee should not be treated as an alter ego of the corporation simply because he is a supervisor or foreman. *Id.* Rather, an employee is to be treated as an alter ego of the corporation only if he "may be deemed the alter ego of the corporation under the standards governing disregard of the corporate entity." *Id.* Under Connecticut law, a court will disregard the corporate entity "'only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and [is] used primarily as

an intermediary to perpetuate fraud and to promote injustice.'" *SFA Folio Collections, Inc. v. Bannon,* 217 Conn. 220, 230, 585 A.2d 666 (1991)(quoting *Angelo Tomasso. Inc. v. Armor Construction & Paving, Inc.,* 187 Conn. 544, 447 A.2d 406 (1982).

The court finds that the plaintiff has not alleged any conduct that would justify finding the employees who allegedly committed the tort to be the defendant's alter ego. In fact, the plaintiff states in her affidavit that Gordon and Smilow, respectively the CEO and COB, disapproved of Lowenthal's behavior at the August 19, 1989 meeting. She further states that Gordon told her that she would never be left alone with Lowenthal. Jordon Aff. at pages 12-13. Moreover, as discussed below, the plaintiff provides no evidence that Smilow or Gordon knew of Lowenthal's alleged history of sexual harassment when the defendant hired him. The plaintiff concedes in her affidavit that she did not complain of the harassment to Smilow or Gordon, but rather went to Marybeth Fiorelli, the manager of the Human Resources Department. *Id.* at page 10.

Accordingly, the court finds that the exclusivity provision of the WCA bars the count for intentional infliction of emotional distress to the extent it is based on acts which occurred prior to termination.

Assuming, arguendo, that the plaintiff's claim is not barred by the exclusivity provision, the court finds that the plaintiff fails to present admissible evidence to show that the defendant engaged in the kind extreme and outrageous conduct required by *Petyan.* The defendant provides deposition testimony of Smilow and Fiorelli in which each denies any knowledge that Lowenthal engaged in sexual harassment or other inappropriate conduct while employed by the defendant. Smilow Dep'n., 5/24/1993 at 63; Fiorelli Dep'n. at 63. In addition, the plaintiff presents no evidence that Lowenthal

sexually harassed women or otherwise acted improperly at his prior employment at Revlon. On the contrary, Sally Dickinson, Revlon's Vice President, Human Resources, testified that no complaints were made by employees at Revlon concerning inappropriate behavior. Dickinson Dep'n. at 28. Nor did she ever see him engage in harassment. *Id.* at 34-35.

The court may not make credibility determinations or weigh evidence in a motion for summary judgment. However, a party opposing summary judgment may not simply make a bald statement that material issues of fact exist without presenting admissible evidence that this is so.[5] The only admissible evidence proffered to show extreme and outrageous conduct is that the plaintiff notified Fiorelli that Lowenthal was harassing her and that this allegedly confidential information was passed on to management which then engineered her termination in order to appease Lowenthal. This routine employment dispute is legally insufficient to support a finding of intentional infliction of emotional distress. *See Ziobro,* 818 F. Supp. at 503.

2. Termination and Post-Termination Conduct

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[5] *See* 6 Moore's Federal Practice (2d Ed. 1995) (citing *United States v. Lot 800 in Square 1928*, 169 F. Supp. 994 (D.D.C. 1959)):

> Defendant also resists the plaintiff's motion for summary judgment by asserting in both of its memoranda of points and authorities that certain genuine issues of material fact exist in this litigation. The fact issues claimed to exist are not properly set forth in the answer or by means of affidavit but are merely listed on page 7 of both of defendant's memoranda.... By reason of their source and their nature, these questions do not form a sound basis for determining that a genuine issue of material fact exists in this case.

The court now turns to an evaluation of all acts proffered by the plaintiff to support her claim of intentional infliction of emotional distress during the course of her termination and after. On September 4, 1989, the defendant terminated the plaintiff. On November 9, 1989, the plaintiff signed the release for the second time. As stated above, acts concerning and following her termination do not fall within the exclusivity period.

The defendant's foundation for the claim of outrageous conduct in this case would appear to be the following: (1) she was pressured into signing the release because Heimerdinger repeatedly asked her to sign it and would "loom" over her (Dep'n. at 310-314); (2) Heimerdinger told her that the stock was "worthless" when in fact it was not; and (3) Heimerdinger threatened to "blackball" her if she did not sign the release. Dep'n. at 321. The plaintiff claims she was in a traumatic state and that this was obvious to others, but admits that she did not tell anyone of her state. Jordan Depin. at 273. She also states that Heimerdinger was trying to be "pleasant" but nonetheless the situation, taken as a whole, was very intimidating. Dep'n. at 312-313.

Although the parties have not directed the court to any cases containing facts similar to the case *sub judice*, it is clear that courts are hesitant to find the tort of intentional infliction of emotional distress present in cases of employment disputes. In addition, the court is mindful of the relatively narrow scope of conduct that falls under this tort. *See Shay v. Paulson,* 884 P.2d 870, 874 (Or. App. 1994) ("It would be inconsistent . . . to hold that, because conduct is illegal, or even criminal, it is per se 'outrageous in the extreme.' "); *Bivins v. Jeffers Vet Supply,* 873 F. Supp. 1500, 1510 (M.D. Ala. 1994).

Considering all the evidence in the light most favorable to the plaintiff, and drawing all reasonable inferences in the

plaintiff's favor, the court finds that the defendant's alleged conduct is not, as a matter of law, sufficient to constitute intentional infliction of emotional distress under Connecticut common law.

D. NEGLIGENT HIRING AND RETENTION OF UNFIT PERSONNEL

The defendant asserts that the plaintiff's claim for the negligent hiring and retention of Lowenthal is preempted by the "exclusivity provision" of the Connecticut Workers' Compensation Act ("WCA").[6] In addition, the defendant asserts that it is barred by the statute of limitations.

1. Exclusivity Provisions

The WCA requires that "to be outside of the purview of § 31-284(a), the employer must have engaged in *intentional* misconduct, as that has been defined through our case law." *Perille v. Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 553 (1985). The plaintiff brings this count asserting negligent conduct by the defendant. Accordingly, the WCA bars the defendant's alleged negligent hiring and retention of Lowenthal because such actions "arise out of or in the course of employment." C.G.S. §31-284 (a); *Williams v. Avco Lycoming,* 775 F.Supp. 47 (D.Conn 1991). Count five should be dismissed. *See Claps,* 819 F. Supp. at 152-153.

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[6] Conn. Gen. Stat. § 31-284(a) provides that:

> [a]n employer shall not be liable to any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter....

2. Statute of Limitations

The plaintiff's count is also barred by the statute of limitations. Conn. Gen. Stat. § 52-584 states:

> No action to recover damages for injury to the person, . . . caused by negligence, or by reckless or wanton misconduct, . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered.

Lowenthal stopped working for the defendant on November 3, 1989. The plaintiff did not bring her complaint until November 9, 1992, more than three years after the allegedly tortious acts occurred. Accordingly, count five should be dismissed.[7]

E. FRAUD

In count six, the plaintiff asserts that the defendant intended to prevent the plaintiff from exercising her stock option rights and to induce her to sign away all claims to stock ownership rights and all rights to legal recourse for the defendant's alleged mistreatment of her. Compl. ¶ 30.

The requirements for common law fraud are: (1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury. *Kilduff v. Adams, Inc.*, 219 Conn. 314 (1991) (citations omitted). As the Supreme Court noted: "It is well established that common law

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[7] In addition, as stated above, the plaintiff does not present evidence showing that the defendant hired a knowingly abusive employee or failed to take appropriate steps after the August 16 meeting. Accordingly, summary judgment should likewise issue for this reason.

fraud must be proven by a higher standard of evidence. This middle tier standard has been described as 'clear and satisfactory evidence' and 'clear, precise, and unequivocal evidence.' " *Id.* at 327-28 (footnote and citations omitted).

The court finds that the last requirement of common law fraud, *viz.*, the allegedly defrauded person acted on the fraudulent statement to her detriment, is not satisfied. As found above, the plaintiff never purchased the stock because she failed to accept the offer by tendering a check for sufficient funds. Accordingly, even if the statements made by Heimerdinger were untrue, she cannot be defrauded out of something to which she had no right. Therefore, summary judgment should issue on this count.[8]

IV. CONCLUSION

For the above reasons, the motion for summary judgment (filing 158)) should be GRANTED.

Either party may seek review of this report and recommendation as provided in 28 U.S.C. § 636(b) (written objections to recommended ruling must be filed within ten days of service of the same); Federal Rules of Civil Procedure 6(a), 6(e), & 72; and Rule 2 of the Local Rules for United State Magistrate Judges (D. Conn.). Failure to object in a timely manner may preclude further review. *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

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[8] The defendant also moves for summary judgment asserting that the release, which the plaintiff signed twice, prevents her from maintaining the various causes of action brought in the complaint. Because the court finds the underlying counts to be without merit, it declines to spend additional time addressing this issue. However, that the plaintiff signed a release with the advice of three attorneys and waited three years to institute this lawsuit indicates that her claims of duress stem from an inability to keep her word and not from misconduct on the part of the defendant.

Dated at Hartford, Connecticut this 27th day of April, 1995.

Thomas P. Smith/signature
Thomas P. Smith
United States Magistrate Judge

APPENDIX D

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III, CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifteenth day of September one thousand nine hundred and ninety-seven.

Present:

Hon. John M. Walker, Jr.
Hon. Jospeh P. McLaughlin
Hon. Fred I. Parker
CIRCUIT JUDGES, 96-7431

UNITED STATES COURT OF APPEALS
FILED: SEPT 15 1997
GEORGE LANGE III, CLERK
SECOND CIRCUIT/stamp

Jordan

Appellant,

v

Playtex Family

Appellee.

A petition for rehearing having been filed herein by KATHRYN JORDAN,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk

by: Beth J. Meador/signature
Beth J. Meador,
Administrative Attorney

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